MARITIME ADMIRALTY LAW

THE NEW DOCTRINE OF THE SUPREMACY OF ADMIRALTY OVER THE COMMON LAW

Three notable recent decisions of the Supreme Court of the United States with regard to the relations between admiralty and common law jurisdiction in maritime matters have announced a new doctrine of the supremacy of admiralty law, which has already had very important consequences with reference to the law of master and servant at sea, with which those cases specifically deal, and is likely to have a far-reaching effect upon the entire domain of sea law. These cases are *Southern Pacific Co.* v. *Jensen*,[1] *Chelentis* v. *Luckenbach S. S. Co.*[2] and *Knickerbocker Ice Co.* v. *Stewart*.[3]

In order to appreciate the novelty of the doctrine set forth in these decisions it is necessary to consider at some length the meaning of the clause of the United States Constitution on which these decisions purport to rest, this clause being that portion of Article III, Section 2, which provides that

"the judicial power" (of the United States) "shall extend . . . to all cases of admiralty and maritime Jurisdiction."

That meaning is to be gathered first of all by an understanding of the situation as to admiralty and maritime law existing when the Constitution was adopted, and secondly by a consideration of the subsequent decisions in which the clause has been interpreted and its effect upon the plenary power which would otherwise be possessed by the state governments has been determined.

By reason of the fact that ships move about freely between the ports of one nation and those of another, the law applicable to maritime affairs has, since the middle ages, been regarded as something distinct from the ordinary municipal law, and as possessing an international character. Thus long before the adoption of the federal Constitution we find separate English courts of admiralty in existence, acting independently of the common law courts and looking to the sea codes of Oleron[4] and Wisbuy rather than to common law precedents for rules of decision, but nevertheless acting as English courts upon which foreign decisions were persuasive merely and not of binding authority. These courts included both prize courts, which, as their name indicates, had jurisdicton to determine the validity of war-time captures at sea,[5] and instance courts,[6] which dealt with ordinary civil actions relating to maritime affairs, and in addition possessed a special form of *in rem* procedure in which a ship or some other *res* was named as defendant and the claims of various persons in respect to that *res* were adjudicated.[7]

In addition to these admiralty courts, however, the English common law courts also dealt with maritime matters. They had no prize jurisdiction and nothing analogous to the *in rem* procedure in admiralty, but their ordinary jurisdiction over personal actions was not confined to cases arising on land, but embraced maritime matters as well.[8] As to the latter, their jurisdiction was, in general, co-ordinate with that of the admiralty courts, although the English common law courts succeeded in excluding the admiralty courts altogether from dealing with certain classes of cases of a definitely maritime character.[9]

A similar situation existed in the American Colonies except that the Colonial vice-admiralty courts appear to have exercised a somewhat broader jurisdiction than the jealousy of the common law courts permitted to the English admiralty courts.[10] These Colonial courts were after the outbreak of the Revolution succeeded by state courts of admiralty,[11] there being at that time no American nation and consequently no national courts, although a right of appeal from the state admiralty courts to the Continental Congress in prize cases was granted by the Articles of Confederation.[12]

When, in 1787, the time came for framing a permanent scheme of government for the American nation, it was obvious that the matter of prize, being a question of public international law, should be dealt with by the national courts and by them alone, and since admiralty courts had dealt with other matters than prize and since these other matters involved to a large extent questions relating to the rights of foreigners and to interstate and foreign commerce, it was natural that the entire admiralty jurisdiction should be conferred upon the federal courts. The provision of the federal Constitution vesting these courts with authority in "all cases of admiralty and maritime Jurisdicton" appears to have been adopted practically without debate.[13]

This federal jurisdiction was from the outset construed both by Congress[14] and by the federal courts as being exclusive so far as the creation

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[1] (1917) 244 U. S. 205, 37 Sup. Ct. 524.
[2] (1918) 247 U. S. 372, 38 Sup. Ct. 501.
[3] (1920) 253 U. S. 149, 40 Sup. Ct. 438.
[4] The laws of Oleron are contained in the ancient *Black Book of the Admiralty* (1871 ed.) I. 88, and were evidently the basis of admiralty decisions at

[5] *Lindo* v. *Rodney* (1781) 2 Doug. 614.
[6] *The Bold Buccleugh* (1851) 7 Moo. P. C. 267.
[7] See Lord Mansfield in *Lindo* v. *Rodney* (1781) 2 Doug. 613, 614.
[8] Benedict, *op. cit.* §78.
[9] *Ibid.* §85 *et seq.*
[10] *Ibid.* §98 *et seq.* For early Pennsylvania admiralty cases see *Montgomery* v. *Henry* (1780) 1 Dall. 49; *Talbott* v. *The Commander* (1784) 1 Dall. 95; *Purviance* v. *Angus* (1786) 1 Dall. 180.
[11] See *Penhallow* v. *Doane's Administrators* (1795) 3 Dall. 54, 56, 80.
[12] There is practically no discussion of this provision in Farrand's *Records of the Federal Convention* (1911), in Elliot's *Debates* (1881), or in the *Federalist*

of admiralty courts were concerned and state attempts to establish courts which should exercise the *in rem* powers that had always been regarded as belonging solely to admiralty courts were uniformly stricken down by the Supreme Court.[15]

We have already seen, however, that there was a large field in which the common law courts had prior to the adoption of the Constitution exercised powers co-ordinate to those of the admiralty courts. What effect did the admiralty jurisdiction clause of the federal Constitution have upon these common law powers? Before that question had been determined by a federal court, Congress undertook to deal with the matter by declaring the federal admiralty jurisdiction to be exclusive "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."[16] It might be thought that this statute, if constitutional, preserved the common law remedy as a matter of congressional grace rather than of constitutional necessity, and the federal courts have shown some tendency to treat the question as one of construction of this statute rather than as one of constitutional law.[17] Nevertheless it was early stated by Mr. Justice Nelson in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, that the saving clause was inserted "probably from abundant caution"[18] and shortly thereafter Mr. Justice Campbell in *Taylor* v. *Carryl*[19] quoted Story on the *Constitution* to the effect that

"the reasonable interpretation [of the Constitution] would seem to be, that it conferred on the national judiciary the admiralty and maritime[20] jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so."

For, as Story further said, the class of cases in which the jurisdiction had formerly been concurrent "can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction."[21]

These words have never been retracted or qualified by the Supreme Court down to the decisions with which we are concerned. Moreover, the act of Congress purporting to preserve a common law remedy has received a very broad construction[22] and the cases in which a remedy attempted to be created by a state have been held not to be a common law remedy within the meaning of the act have been, as we shall see, cases in which the admiralty jurisdiction had even prior to the Constitution been regarded as exclusive. It would seem, therefore, that the act is unimportant and that it is the Constitution itself and not merely friendly congressional legislation which has preserved the common law jurisdiction in all its original vigor. This common law jurisdiction is, of course, under our Constitution, a state jurisdiction, except in so far as the federal courts have authority to act in common law cases by reason of diversity of citizenship or otherwise.

We are accordingly brought to the next step in our investigation in which, having found that both common law and admiralty courts have power to hear cases involving maritime matters, it becomes necessary to determine what are the sources of the substantive law which these courts administer, whether or not both courts administer the same law, and, if so, to what extent they are in fact co-ordinate in the sense of having equal authority to interpret it.

Dealing first with the courts of admiralty, we have already found that the law administered by those courts, is in large measure at least, of foreign origin. That law had, however, long before the adoption of the Constitution, become a part of our law, although it was administered by separate courts and although it never became incorporated in the body of the common law as was the case with the law merchant.[23] The English maritime law, which was, as we have seen, of a somewhat restricted character, was not, however, adopted by the federal courts to the same extent to which the English common law has been adopted.[24] Colonial and Revolutionary precedents were few, and the federal courts of admiralty have to a considerable extent blazed their own trail, not arbitrarily, but by working over English, Colonial, and Continental admiralty precedents into a harmonious federal system. However, as is pointed out by Mr. Justice Holmes in his dissenting opinions in the *Jensen* and *Knickerbocker* cases, this early admiralty law was not, even when developed by the ordinary processes of judicial reasoning, a complete and adequate system; and in many respects, and especially with regard to the law of master and servant with which the recent cases in question deal, this law of the sea has been supplemented by the adoption of common law principles in admiralty cases.

In addition to this judicial development of admiralty law, it became established after a considerable period of doubt[25] that the admiralty

[15] *The Moses Taylor* (U. S. 1866) 4 Wall. 411; *The Hine* v. *Trevor* (U. S. 1866) 4 Wall. 555.
[16] See *supra*, footnote 14.
[17] See, for example, *Steamboat Co.* v. *Chase* (U. S. 1872) 16 Wall. 522.
[18] (U. S. 1848) 6 How. 344, 390.
[19] (U. S. 1857) 20 How. 583, 598.
[20] Story expresses the opinion that the word "maritime" was added to the word "admiralty" in order "to guard against any narrow interpretation of the preceding word." Story on the *Constitution* (5th ed. 1891) §1666.
[21] *Ibid.* §1672, note (2).
[22] See, for example, *Knapp, Stout & Co.* v. *McCaffrey* (1900) 177 U. S. 638, 644, 20 Sup. Ct. 824.

[23] "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the Country. . . ." *The Gaetano and Maria* (1882) L. R. 7 P. D. 137, 143.
[24] As the courts of the United States did not follow the narrow English view as to admiralty jurisdiction they necessarily dealt with many cases for which there were no English precedents. See *The Lottawanna* (U. S. 1874) 21 Wall. 558, 576.
[25] See *Ibid.* 577.

jurisdiction clause of the Constitution conferred upon Congress an implied power to modify admiralty law by statutory enactment.[26] In the meanwhile, in the absence of such congressional legislation, the state legislatures had sought in various ways to supply the deficiency by enacting laws of their own, and it was decided at an early date that these legislatures, although powerless to create admiralty courts of their own, could create maritime rights which the federal courts of admiralty would enforce.[27]

Owing perhaps to the original belief that Congress had no power to modify admiralty law, it was even held that a state statute creating a right *in rem* which could be enforced only by a federal court of admiralty might nevertheless be valid and binding upon the admiralty courts. Thus state statutes creating liens on domestic vessels enforcible in *in rem* proceedings were upheld,[28] although the court at a later date, after the power of Congress to alter admiralty law became thoroughly established, refused to extend this principle to statutes purporting to create rights *in rem* in foreign vessels, and declared these statutes to be invalid.[29]

While the admiralty courts were thus developing their own law in this manner with the aid of federal and state legislation, the common law courts of the states and of the United States were also dealing with maritime torts and contracts. In doing so they looked to a large extent to the admiralty decisions for guidance,[30] but also, as was natural in view of the difference in their modes of procedure and of the fact that they were common law courts dealing in general with rights arising out of events occurring in their own common law territories, they in some cases adopted common law views in matters of substantive law which were at variance with those accepted by the admiralty courts. In at least one important respect, that of the effect to be given to contributory negligence, they differed radically from the admiralty courts. With the sanction of the Supreme Court of the United States they adhered in maritime cases to the ordinary common law rule that such negligence was a complete bar to the plaintiff's claim,[31] while the admiralty courts treated such negligence as having merely the effect of reducing the amount of the plaintiff's recovery.[32]

[26] *In Re Garnett* (1891) 141 U. S. 1, 11 Sup. Ct. 840.
[27] *Ex parte McNiel* (U. S. 1871) 13 Wall. 236; *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133.
[28] *Peyroux v. Howard and Varion* (U. S. 1833) 7 Pet. 324; *The J. E. Rumbell*

Not only did the common law courts thus exercise the right to decide maritime cases according to their own view of the common law, but this common law jurisdiction was held to give to the state legislatures the same right to change the common law within their boundaries with reference to seafaring matters which they had to change their common law in other respects. Thus state laws providing for pilotage fees,[33] for attachment of ships in common law actions,[34] and for recovery for injuries at sea resulting in death [35] were upheld both by the state and by the federal courts of common law.

In general, however, these state statutes did not increase the differences between the common law and the admiralty law as in most cases the state statutes were held to be binding upon the admiralty courts as well. Those differences did, however, exist, as we have seen, and both state and federal courts recognized their existence as something natural and unavoidable.[36]

It is, of course, a familiar principle that whenever state and federal courts have co-ordinate jurisdiction neither court is bound to follow the decisions of the other if it believes them to be inconsistent with established doctrines.[37] The diversity of view between admiralty and common law courts is not, however, a difference between co-ordinate courts established by different sovereignties. The application of common law in lieu of admiralty doctrines to maritime matters is not confined to the state courts but is equally characteristic of the federal courts where these are sitting as common law tribunals. Thus, in dealing with the question of the liability of the owner of a vessel for injuries to one member of the crew due to negligence of another, the Supreme Court of the United States has in a common law case treated the question as governed solely by the common law fellow-servant doctrine, but has said in an admiralty case that the owner's exemption from liability is independent of the fellow-servant rule.[38]

The parallel is not, therefore, to other cases of concurrent power as

[33] *Cooley v. Board of Wardens* (U. S. 1851) 12 How. 299. The unsuccessful attack on the statutes was based solely on the commerce clause.
[34] *Rounds v. Cloverport Foundry & Machine Co.* (1915) 237 U. S. 303, 35 Sup. Ct. 596.
[35] *McDonald v. Mallory* (1879) 77 N. Y. 546; *Steamboat v. Chase, supra,* footnote 17.
[36] *Kalleck v. Deering* (1894) 161 Mass. 469, 37 N. E. 450; *Allec v. Packet Co., supra,* footnote 32; *Workman v. New York City* (1900) 179 U. S. 552, 557, 21 Sup. Ct. 212.
[37] See *Smith v. Alabama* (1888) 124 U. S. 465, 478, 8 Sup. Ct. 564.

between the state and the national courts but rather to other cases of concurrent power as between different courts established by the same government, such as the concurrent power which courts of common law and equity have in many cases, which, as in the case of the concurrent authority of the common law and the admiralty courts, frequently results in diversity of decision in spite of the familiar maxim that equity follows the law.

There is, however, one important distinction between the admiralty and the equity situations. Both common law and equity, whether administered by state or federal courts, are clearly state law.[39] With regard to admiralty law, however, the federal courts, having been vested with exclusive jurisdiction to act as admiralty courts, have treated the law administered by them as having a federal rather than a state origin, at least to the extent to which it is based on the law of the sea and not on common law principles.[40]

On the other hand, since there is no such thing as federal common law[41] there can be no doubt that the application of a common law remedy to a maritime case involves the application of state law. Furthermore, in view of the fact that the state courts have been held to be free to follow their own rules of substantive law as well as of procedure in maritime cases, it would seem that the substantive rules which they enforce as well as the procedural remedies which they grant must be regarded as state law.

The situation is, no doubt, an anomalous one. The anomaly is in part due to the difficulty of reconciling the views of the common law judges that the common law enforced by them is applicable to all persons within the territory, whether afloat or ashore,[42] with the admiralty notion of an international law based on the civil law which is applicable to ships and seamen in all countries of the world and is enforced in special admiralty courts, a difficulty which exists quite apart from any special constitutional provisions.[43] So far as the difficulty is a constitutional one, it is due rather to the Supreme Court's theory that the Constitution by transferring admiralty jurisdiction to the federal courts in some mysterious manner changed the content of admiralty law from a state to a federal body of rules[44] than to the theories of advocates of state's rights as to the concurrent power of the common law courts.

Such was the situation with regard to the jurisdiction of the state and federal courts and legislative bodies when the *Jensen* case came before the Supreme Court. Before considering that case at length, however, it is desirable in order to arrive at a better understanding of that decision to consider briefly the specific rules which had at that time been worked out by admiralty and by common law courts as to the law of master and servant in maritime cases.

So far as courts of admiralty were concerned a rather extraordinary distinction would seem to have existed between the obligations of a ship owner towards the crew of his vessel and his obligation towards a stevedore who might be at work thereon. With regard to the former it had long been established that by maritime law the owner was bound to take care of a seaman who fell sick or met with an accident at sea to the extent of giving him proper maintenance and medical care. In the case of *The Osceola*,[45] the Supreme Court decided that, except in cases of unseaworthiness of the vessel, this claim to care and cure was the limit of the seaman's rights. The court further held that the owner's immunity was not due to the fellow-servant rule but to a complete absence from the admiralty law of any principle of liability applicable to the case. Nevertheless the court went on to state, somewhat irrelevantly as it would seem, that all members of the crew, except perhaps the master, are fellow servants.[46]

In *Atlantic Transport Co.* v. *Imbrovek*,[47] on the other hand, the court decided that a stevedore engaged in unloading a vessel is, in accordance with the common law rules of master and servant, entitled to sue in admiralty the stevedore company by whom he was employed for damages for an injury occasioned by the failure to provide him with a safe place to work on board of a ship, although the defect in the ship was scarcely one which could be regarded as making the ship unseaworthy. There is nothing in the case to indicate that a different rule would have been applied had the plaintiff's employer been the owner of the vessel.

The common law courts, on the other hand, while recognizing the seaman's peculiar right to medical aid, had in general assumed that this was not a substitute for the ordinary common law rules as to a master's liability to a servant but an additional right arising out of the maritime

[39] *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan* (1898) 169 U. S. 133, 136, 18 Sup. Ct. 289.

[40] *The Lottawanna, supra*, footnote 24, p. 574. See also *Workman* v. *New York City*, and *The Roanoke, supra*, footnotes 36 and 29.

[41] *Wheaton* v. *Peters* (U. S. 1834) 8 Pet. 591, 658; *Western Union Tel. Co.* v. *Call Pub. Co.* (1901) 181 U. S. 92, 101, 21 Sup. Ct. 561.

Let us now turn to the *Jensen* case, in which, as we have seen, the New York Workmen's Compensation Act was held to be unconstitutional as applied to an accident to the stevedore which occurred while he was on shipboard engaged in unloading a vessel in New York harbor. The opinion of the court, which was written by Mr. Justice McReynolds, recognizes that in view of previous decisions it is too late to deny that the general maritime law may to some extent be modified or affected by state legislation. The learned Justice points out, however, that states have been forbidden to authorize proceedings *in rem* in their own courts according to the course of admiralty or to create liens for materials used in repairing foreign ships and argues that the underlying principle of those cases is that not state legislation

"is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations" [49]

although, as we have seen, all that those cases had actually decided was that no state could create a court of admiralty and that there were limits to the obligation on federal courts of admiralty to enforce state statutes in *in rem* proceedings.

In support of his general doctrine he further quotes some language from the opinion of Mr. Justice Bradley in *The Lottawanna*, to the effect that the admiralty and maritime law to which the constitution refers,

"is a system of law co-extensive with and operating uniformly in the whole Country." [50]

That case was, however, an admiralty case, the sole question before the court being whether the rule laid down in the earlier decisions, to the effect that no lien was created against a domestic vessel by the furnishing of supplies to that vessel, should be overruled. There is nothing in Mr. Justice Bradley's remarks about the importance of uniformity in the law administered by courts of admiralty to indicate that the state courts in administering remedies given by the common law or by state legislation modifying that law are not wholly independent of admiralty rulings so long as no question of remedies peculiar to admiralty courts is involved.

Dissenting opinions in the *Jensen* case were written by Justices Pitney and Holmes, each of them being concurred in by Justices Brandeis and Clarke. Mr. Justice Pitney's opinion is for the most part an elaborate and painstaking review of the history of admiralty jurisdiction both prior and subsequent to the enactment of the United States Constitution, the conclusions reached by him therefrom being, in the main, similar to those stated in the preceding portion of this article. In addition he dwells at some length on the analogy between the admiralty clause and the commerce clause of the Constitution and argues that, it being well settled that the express power given to Congress to regulate interstate and foreign commerce does not in the absence of congressional action prevent the states from enacting legislation similar to the New York Workmen's Compensation Act,[51] the implied power given to Congress to enact admiralty legislation ought not to be treated as a more drastic prohibition of state action.

Striking as this analogy seems at first sight, it is submitted that it does not in reality add anything to the force of the arguments against the decision previously presented. In the absence of congressional regulation the law applicable to interstate commerce is unquestionably state law and the states are free to change this law despite the commerce clause unless by so doing they impose an undue burden upon that commerce. It appears to be Mr. Justice McReynold's view, however, that the admiralty situation is a wholly different one, and that entirely apart from any implied power of legislation in Congress the federal courts have, under the sanction of the Constitution, in some mysterious manner established a federal code of admiralty law which is not to be impaired either by state courts or by state legislatures. According to his view of the matter it is the judicial power of the court rather than the legislative power of Congress which is interfered with by the statute in question. The writer agrees with Mr. Justice Pitney that this view is unsound, but its unsoundness cannot be demonstrated by referring to the commerce clause which, unlike the admiralty clause, possesses a purely legislative character.[52]

Let us now turn to Mr. Justice Holmes' opinion. After referring briefly to prior decisions and pointing out that these leave no doubt that the granting of admiralty jurisdiction to the United States did not deprive either the state courts or the state legislatures of all power to deal with maritime matters, he goes on to argue that in the light of

(1892) 135 N. Y. 1, 31 N. E. 969; *Kalleck* v. *Deering*, *supra*, footnote 36, s. c. (1897) 169 Mass. 200, 47 N. E. 698. It was, however, suggested by some of the lower federal courts that maritime contracts are governed solely by maritime law and that this doctrine applied to cases involving the obligations of shipowners to injured seamen in their employ. *Cornell Steamboat Co.* v. *Fallon* (C. C. A. 1910) 179 Fed. 293; *Schuede* v. *Zenith S. S. Co.* (D. C. 1914) 216 Fed. 566;

No such federal law exists, however. Admittedly there is no federal statute covering the subject. Moreover, even if it be assumed that the medieval law of the sea as developed by the federal admiralty courts is, as Mr. Justice Bradley appears to have thought, a federal and not a state law, this law is entirely barren of any principles governing the situation, the law with regard to the liability of employer and stevedore administered by the Supreme Court in the *Imbrovek* case—the very law which Mr. Justice McReynolds regards as the obstacle in the way of the validity of the New York statute—having, says Mr. Justice Holmes, a purely common law origin.

Where did this common law come from?

"The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . It always is the law of some State." [53]

This common law cannot have been introduced into admiralty by the mere fiat of the judges for that would be judicial legislation. He says:

"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.' No more could a judge exercising the limited jurisdiction of admiralty say, 'I think well of the common law rules of master and servant and propose to introduce them here *en bloc*.' Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the States." [54]

The true theory must be that the common law principles are enforced in the admiralty courts because the state law exists to some extent in admiralty *ex proprio vigore* and independently of the will of the federal judges. But the state legislature clearly has power to change its own law and has done so. Hence the rule of state law applied in the *Imbrovek* case no longer exists either in admiralty or elsewhere, and there is no law on the subject except the Workmen's Compensation Act, which, not being in conflict with any provision of the federal Constitution, is clearly valid.

This is simple and logical but it may be doubted whether it is wholly satisfactory from an historical standpoint. Possibly the cases in which the admiralty courts had previously declined to follow state law can be explained consistently with this theory by saying that the law as applying merely by analogy.[55] To admit that it has no other validity than this may, as he says, be to convict the judges who introduced it of having been guilty of wholesale judicial legislation. Most common lawyers have, however, a natural if erroneous feeling that the common law is little less than "a brooding omnipresence in the sky," and hence judges trained in that law would feel few qualms about applying it to situations to which it might not, strictly speaking, relate—unconscious that they were thus legislating and legislating pretty radically.[56]

A theoretical jurist may say that all admiralty law is in reality state law or he may qualify this statement as Mr. Justice Holmes does by saying that it is state law so far, at least, as it is not based on the law of the sea. Our federal judges appear, however, to have treated the admiralty law which they administered as federal law irrespective of the source from which its principles might be derived. Mr. Justice Pitney's theory that the admiralty judges have adopted an eclectic policy of consciously or unconsciously borrowing such common law principles as seemed to them to be needed would seem more nearly to represent what has actually taken place, although it impliedly admits that the admiralty judges have acted as legislators in so doing.

Both views are equally effective, however, as lines of attack upon the decision in the *Jensen* case. If the maritime law of master and servant is, except where Congress has legislated on the subject, state law, it is clearly subject to state modification. If, on the other hand, the law enforced by admiralty courts on that subject rests upon no firmer foundation than the borrowing of certain common law rules by admiralty judges as an act of judicial legislation, it obviously possesses no such Constitutional sanction as to make it superior to the laws established by the legislature of a sovereign state.

This divergence of view between Justices Holmes and Pitney would, however, have been of great importance if the *Jensen* case had been decided in favor of the validity of the New York law. The question would then speedily have arisen as to the effect of the New York act on the law declared by the admiralty court in the *Imbrovek* case. If, as Mr. Justice Holmes contends, that law is state law, then it ought to follow that the unwritten state law having been superseded by legislative acting there is no longer any law in existence except the statute. That statute is, however, as Mr. Justice McReynolds points

out in the *Knickerbocker* case,[57] incapable of enforcement by an admiralty court since it provides for an administrative and not a judicial procedure. We would thus have the curious result that although the federal admiralty jurisdiction is exclusive a state legislature can, by exercising a concurrent common law power, completely oust the federal court from an established jurisdiction over an important branch of the maritime law.

Nevertheless, if Mr. Justice Holmes' premise be sound, this conclusion, although somewhat surprising, seems entirely rational. A state is clearly under no duty of preserving its law in such shape that it is capable of enforcement through the machinery of courts established by Congress. Thus, for example, the Constitution gives the federal courts jurisdiction over controversies between citizens of different states, yet it will hardly be contended that a Massachusetts employee hired under a New York contract can bring an action in a federal court against his New York employer for an injury suffered in New York when New York has abolished the common law action and substituted therefor a purely administrative remedy.

If, on the other hand, Mr. Justice Pitney's view be followed, the rule laid down by the admiralty court in the *Imbrovek* case should apparently be treated as a federal rather than a state rule, and hence one which would be unaffected by legislative changes in the law of New York.[58] The result would be a serious lack of uniformity between state and federal rules, but this lack of uniformity would differ in degree rather than in kind from that already existing as to the effect of contributory negligence. Moreover, however unfortunate such lack of uniformity may be, it is clearly no sufficient reason for setting aside the state statute, if, as is believed to be the case, there is no principle of constitutional law deducible either from the language of the constitutional provision itself or from principles of interpretation established by prior decisions which make the purely judge-made rule of the admiralty courts the supreme law of the land.

Furthermore, as a practical matter, it is very doubtful whether the decision in the *Jensen* case will bring about any real uniformity in the rules governing the liability of employers of stevedores to their employees. The general rule is well settled that unless the situs of an injury is maritime, admiralty courts have no jurisdiction over it, and the remedy in the state courts is exclusive.[59] It would seem to follow that an injury to a stevedore which occurs not on board ship but on the wharf is a matter wholly outside of admiralty jurisdiction, and that such an injury occurring in the state of New York is governed by the workmen's compensation law of that state.[60] While it is possible that the subsequent decision of the Supreme Court in the *Knickerbocker* case[61] has extended the admiralty jurisdiction to cover cases of this sort, that case does not, on its face, decide anything more than that an injury to a stevedore resulting from falling off a wharf into the water is one having a maritime situs, and it is by no means clear that the court would have held admiralty law to be applicable to an accident occurring wholly on the wharf. Since a stevedore's employment necessarily involves his constant movement back and forth between boat and pier, a rule which may thus make his rights vary so substantially according to the precise spot at which he happens to suffer an injury has little to recommend it from the standpoint of uniformity.

As a matter of fact, the division of the court, with Justices Holmes, Brandeis and Clarke, together with one other Justice deciding in favor of the employee and the remainder of the court under the leadership of the conservative Mr. Justice McReynolds upholding the contentions of the employer, is so familiar as to suggest that, whether consciously or not, it was not primarily the question of uniformity which determined the court's decision—an inference which is strengthened by a consideration of the views which the respective Justices have expressed in other cases as to the desirability of workmen's compensation acts such as that of New York State. It is true that that particular act in question was upheld by a unanimous court in *New York Central R. R. v. White*,[62] but it is apparent from the views expressed by Justices McKenna and McReynolds and concurred in by Justices White and van Devanter in the later *Arizona Employer's Liability Cases*[63] that their concurrence in the opinion of the court in the *White* case did not involve any whole-hearted acceptance of the social and economic theories on which workmen's compensation acts are based, theories with which not only Justices Holmes, Brandeis and Clarke but the more conservative Justice Pitney, as is evident from the latter's opinion in the *Arizona* cases, concurred in by the other three, are in complete agreement. This leaves only one judge, Mr. Justice Day, who appears from the *Arizona* cases to be an ardent believer in workmen's compensation laws and who yet voted against the validity of the New York law as applied to the facts of the *Jensen* case.

Whatever be the true explanation of the decision in the *Jensen* case, however, the doctrine of uniformity there laid down has been rigidly

[57] *Supra*, footnote 3, p. 166.

[58] This was the view of the New York Court. *Matter of Walker, Clyde*

[59] *Swayne & Hoyt v. Borsch* (C. C. A. 1915) 226 Fed. 581, 587. In *Atlantic Transport Co. v. Imbrovek*, *supra*, footnote 47, pp. 58, 61, the court assumed that this requirement that the injury take place on the water applies to personal injury cases where the plaintiff is an employee of the defendant.

adhered to in subsequent cases involving the law of master and servant at sea. Thus in *Chelentis* v. *Luckenbach S. S. Co.*,[64] the Supreme Court held that a steamship company is not liable at common law for an injury to a seaman which was alleged to be due to the negligent acts of a superior officer in spite of a provision in the Federal Seaman's Act to the effect that "Seamen having command shall not be held to be fellow-servants with those under their authority."[65] Justices Pitney, Brandeis and Clarke again dissented, this time without opinion, and Justice Holmes concurred in the result only.

The opinion, again by Mr. Justice McReynolds, assumes that the statute may be broad enough to cover the negligence of a subordinate officer, but takes the position that even as so construed the statute has no bearing on the case. The court finds the admiralty rule as established by the case of *The Osceola* to be that the shipowner's immunity from liability for injuries to a seaman not due to the unseaworthiness of the ship is not based upon the fellow-servant doctrine. This rule, says the court, must by reason of the principle of uniformity established by the *Jensen* case be equally applicable in a common law action, and hence a statutory rule to the effect that seamen having command are not the fellow servants of those under them is wholly immaterial so far as the rights of the parties in personal injury cases are concerned.

Assuming the correctness of the court's view of the admiralty law, the situation was not free from difficulty. If, on the one hand, the court were to hold, as it did, that the common law was necessarily the same as the admiralty law, it would reach a result entirely consistent with the *Jensen* case, but even more inconsistent with previously well settled principles than is the result reached in that case. If, on the other hand, it were to hold that the common law courts were independent of admiralty and that the fellow-servant rule was a well settled common law doctrine applicable in common law courts to maritime injuries,[66] it would then have to decide whether an act of Congress, enacted under the admiralty clause of the Constitution and of such a character as to have no effect upon the admiralty rule covering the case, should be given effect to change the common law rule and that only, a result which might well be thought undesirable both from a theoretical and from a practical standpoint.

The important feature of the case is not, however, the construction placed upon a particular act of Congress, but rather the broad doctrine laid down by Mr. Justice McReynolds that the existence of a concurrent remedy at law merely permits the common law courts to apply their own remedies to maritime cases and does not authorize them to depart from the rules of substantive law laid down by admiralty courts as applicable to cases relating to similar facts. By its opinion in this case the Supreme Court appears definitely to have adopted the view which Mr. Justice Pitney declared to be the effect of the *Jensen* case that the Supreme Court of the United States is in all maritime cases a court of last resort with power by writ of certiorari to review any decision of a state court in a maritime case, even though no state or federal statute is involved in the decision[66]—a doctrine which recalls the ancient maxim, *"Boni judici est ampliare jurisdictionem."*

The doctrine of this case thus involves, even more clearly than that in the *Jensen* case, a radical departure from the principle taken in the earlier cases which the court does not purport to overrule. The well settled diversity of view between the admiralty and the common law courts as to the effect of contributory negligence under the unwritten law can scarcely be explained as a mere matter of procedure, and it is equally hard to see how, if the content of maritime law is federal rather than state, a state legislature has power to change it, even if the changes previously held valid by the Supreme Court are not to be deemed such as work "material prejudice to the characteristic features of the general maritime law."

It is nevertheless most unlikely that principles so well established as the right of common law courts to deny relief in maritime cases to persons guilty of contributory negligence or the right of a state legislature to give an action for death resulting from an act which the admiralty courts themselves recognize as wrongful[67] will be abandoned as a result of these decisions. The cases establishing such doctrines are not likely to be overruled, but how far can they still be regarded as authority beyond the precise point established by them? In hazarding what can at this time be scarcely more than a guess as to the answer to this question, it seems safest to distinguish pretty sharply between state statutes and common law decisions.

If the Supreme Court of the United States is to act as a court of last resort in all maritime cases, common law as well as admiralty, there seems little reason why it should permit any divergence between the unwritten law enforced in the one and in the other class of case, except where the differences between the common law and the admiralty procedure necessarily require such a divergence, where the divergence is sanctioned by established precedent, or where it is too unimportant to induce the court to exercise its discretionary power to grant a writ of certiorari.[68] The situation with regard to state stat-

[66] *Quebec S. S. Co. v. Merchant*, *supra*, footnote 38 certainly assumes, if it does not necessarily decide, that this view is correct.

[67] The recent act of Congress, (1920) 66th Congr. 2d Sess. c. 111, creating an action for damages for death by wrongful act occurring on the high seas expressly states that the provisions of any state statute giving remedies for death shall not be affected by it and that the act shall have no application to maters

utes is, however, a wholly different one. The Supreme Court has itself no legislative power and Congress cannot be expected to interest itself in local affairs sufficiently to enact all such local police regulations as may be needed in order to protect the rights of the public. Even if the admiralty clause, unlike the commerce clause, makes the unwritten as well as the written law a federal one, the need for state authority to enact local police regulations is no less urgent in the one case than in the other.[69]

The remaining case, that of *Knickerbocker Ice Company* v. *Stewart*,[70] is important from the standpoint of this article, mainly as re-emphasizing the doctrine of the *Jensen* case that it is the judicial power conferred upon the federal courts by the admiralty clause rather than the legislative power impliedly conferred upon Congress that makes such state laws as the New York Workmen's Compensation Act invalid.

The Supreme Court having deduced from the supposed principle of uniformity the supremacy of the federal admiralty courts over the decisions of state courts and the enactments of state legislatures, there remained only one peril to the uniformity of the maritime law to be guarded against, namely, the possibility that Congress might interfere with that uniformity either by adopting state laws or by passing a non-uniform law of its own. This peril was not long in appearing. As a result of popular disapproval of the position in which employees of steamship companies were placed by the *Jensen* decision, Congress in October, 1917, amended the 24th Section of the Judicial Code by altering the saving clause so as to make it read as follows:

"saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workman's compensation law of any state."[71]

After conflicting decisions had been rendered in the lower federal courts as to the effect of this amendment,[72] the question of its validity and construction came before the Supreme Court in the *Knickerbocker* case, which, like the *Jensen* case, involved the application of the New York Workmen's Compensation Act to an injury which the court regarded as maritime in character.[73]

The court, speaking again through Mr. Justice McReynolds, held that the clear intent of the statute was in effect to overrule the *Jensen* decision and to validate the New York act and that so construed the statute was unconstitutional. Mr. Justice McReynolds' position seems to be that if the law be regarded as an attempted delegation of power by Congress to the state legislatures it was clearly invalid, as the uniformity of the admiralty law is required by the constitution and is not merely a product of the will of Congress express or implied; and that if the act be regarded as an adoption of the state laws as acts of Congress it is still void for lack of uniformity and because of the failure on the part of Congress to exercise an independent judgment with regard to the subject matter.

Justices Holmes, Brandeis, Clarke and Pitney again dissented in an opinion written by Mr. Justice Holmes. This opinion expressed the view that the law is clearly an adoption of the state laws by Congress as federal legislation and that as such it is altogether unexceptionable, since there is no constitutional requirement that federal laws shall be uniform except in the case of bankruptcy legislation, and since ample precedents for the adoption of federal laws by Congress exist in such cases as the adoption of state pilotage laws by Congress[74] and of state criminal statutes as applicable in federal reservations within the boundaries of a state,[75] as well as the act providing for conformity of federal to state practice,[76] and the so-called "bone-dry" law which had been held to be constitutional by the majority of the court in opposition to

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supra, footnote 1. In *Simmons* v. *Duart* (1920) 251 U. S. 547, 40 Sup. Ct. 342, it was held that a writ of error does not lie in such a case. There is nothing in the case to indicate that the court has not jurisdiction on certiorari which would seem to be the proper proceeding under §237 of the Judicial Code as amended by (1916) 39 Stat. 726, U. S. Comp. Stat. (1916) §1214.

[69] Doubtless the state jurisdiction over common law crimes, such as murder, occurring on shipboard still exists in any event. There is no federal common law of crimes, *Manchester* v. *Massachusetts* (1891) 139 U. S. 240, 11 Sup. Ct. 559, and Congress has not provided for the punishment of crimes taking place in waters within state boundaries and not involving any breach of federal maritime regulations. See (1909) 35 Stat. 1142, U. S. Comp. Stat. (1916) §10445.

[70] *Supra*, footnote 3.

[71] (1917) 40 Stat. 395, U. S. Comp. Stat. (Supp. 1919) §991 (3).

[73] The opinion states that the plaintiff's intestate "while employed . . . as a bargeman and doing work of a maritime nature . . . fell into the Hudson River and drowned." It appears from the original papers that he was standing on a wharf at the time. Apart from the New York statute, the defendant's liability, if existing at all, would have been a tort rather than a contract liability. As a general rule, admiralty has no jurisdiction over torts unless the injury occurred on the water. *The Plymouth*, *supra*, footnote 59. Although the case is a close one, it would seem that the injury in the present case did not so occur. See *The Albion* (D. C. 1903) 123 Fed. 189. It is not entirely clear whether the decision that admiralty has jurisdiction is to be regarded merely as a holding that an injury of this sort does occur on the water, or involves an extension of the jurisdiction over torts to include cases involving the doing of work of a maritime nature, irrespective of the place of the injury, or is based on the theory that actions for personal injuries between an employer and an employee should be regarded as so closely connected with the contract of employment as to give admiralty jurisdiction whenever the contract is maritime. See *Matter of Doey* v. *Houdand Co.* (1918) 224 N. Y. 30, 120 N. E. 53. The second and third propositions seem wholly inconsistent with the reasoning of the *Imbrovek* case, and the doctrine of that case and of the earlier cases on which that decision is based can hardly be regarded as modified in this important respect by the language above quoted which purports to be a mere statement of fact and not the enunciation of any legal principle.

[74] *Gibbons* v. *Ogden* (U. S. 1824) 9 Wheat. 1, 207.

Mr. Justice Holmes' own views.[77] The learned Justice frankly states, however, that he still regards the New York law as constitutional for the old reasons as well as for the new, and it is difficult to support his contention that an act which hands over the whole subject of compensation for maritime injuries, by hypothesis a federal matter, to a state administrative agency, and clearly contemplates that an employer shall have the right to insure against liability under the law by depositing money in a state insurance fund of which the Treasurer of New York State is custodian, can be regarded as a federal law.

The importance of the dissent of Mr. Justice Holmes and his associates is, from the point of view of admiralty law at least, to be found in the indication which it gives of the reluctance of the minority of the court to accept the novel doctrine of the *Jensen* case, rather than in the ingenious reasoning in which Mr. Justice Holmes attempts to show that the act of Congress alters the situation presented in the former case.

Despite this tenacity of view on the part of the minority, however, the thrice repeated assertion by the majority of the court in the cases under discussion of the doctrine of the uniformity of the maritime law and its predominantly federal character irrespective of the court in which it may be enforced can scarcely be regarded as other than the settled law of the land, though for reasons such as those previously outlined it is probable that this view will not in all respects be carried by the Supreme Court to its logical conclusions. Opinions may well differ as to whether the limitations thus imposed upon the powers of the states are desirable or otherwise, but it is submitted that, desirable or not, these limitations are without substantial support either in the language of the federal Constitution or in the previous judicial history of the subject.

No doubt the tendency which these cases show to increase the centralization of our government by stretching the powers of the federal government to their utmost is in accord with the spirit of the age, although a comparison of these cases with recent decisions such as *Hammer* v. *Dagenhart*[78] invalidating the federal child labor law, *Evans* v. *Gore*[79] impliedly denying the power of Congress under the Sixteenth Amendment to tax state bonds, and *Gilbert* v. *Minnesota*,[80] upholding state interference with freedom of speech in matters of national concern, may give ground for certain ironical reflections as to the purposes for which the doctrine of federal supremacy is invoked.

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[77] *Clark Distilling Co.* v. *Western Maryland Ry. Co.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[78] (1918) 247 U. S. 251, 38 Sup. Ct. 529.